IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GARTH ST. PAUL JARAMILLO,
Appellant.

No. 2 CA-CR 2017-0407
Filed October 30, 2018

Appeal from the Superior Court in Pima County
No. CR20152876001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 Following a jury trial, Garth Jaramillo was convicted of the lesser-included offense of possession of marijuana, possession of drug paraphernalia, and possession of marijuana for sale weighing more than four pounds. After finding that Jaramillo had a prior felony conviction, the trial court sentenced him to concurrent, presumptive prison terms, the longest of which is 9.25 years, to be served concurrently with the sentence in another matter. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999), asserting he has reviewed the record but found no arguable question of law. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, he has provided "a detailed factual and procedural history of the case with citations to the record" and asks this court to search the record for fundamental error. Jaramillo has filed a supplemental brief.

¶2 Viewed in the light most favorable to sustaining the verdicts, *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999), the evidence at trial was sufficient to support the jury's verdicts. *See* A.R.S. §§ 13-3405(A)(1), (A)(2), (B)(1), (B)(6), 13-3415(A). In July 2015, during a search of Jaramillo's residence pursuant to a search warrant, officers discovered "a bale of marijuana" weighing twenty-three pounds in a closet "wrapped in green plastic cellophane wrap," packaging and shipping material in the garage, and "some" marijuana and a large "marijuana scale" in a kitchen cabinet. Sufficient evidence also supported the trial court's determination that Jaramillo had an historical prior felony conviction. His sentences are within the statutory range and were lawfully imposed. *See* A.R.S. § 13-703(B), (I).[1]

¶3 In his supplemental brief, Jaramillo first asserts the trial court improperly restricted him from cross-examining the state's expert witness,

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[1]We cite the current version of the statute, which has not changed in relevant part since Jaramillo committed his offenses.

a police detective. Jaramillo maintains the evidence he was prohibited from eliciting would have illustrated that the detective "was at best marginally qualified as an expert witness based on his prior testimony in three previous cases, one of which resulted in a mis[]trial and the other an acquittal." However, the record shows that although the court ultimately sustained the prosecutor's repeated objections after Jaramillo made an offer of proof, it first permitted Jaramillo to question the detective extensively. The court ultimately found the information presented in defense counsel's offer of proof "irrelevant" and concluded "[t]he probative value is not outweighed by the danger of unfair prejudice."

¶4 We review rulings by the trial court regarding the admission of evidence for an abuse of discretion. *State v. Tucker*, 215 Ariz. 298, ¶ 58 (2007). Other than generally asserting that the outcomes in some of the detective's prior cases would have shown he was not qualified as an expert witness in this matter, Jaramillo has failed to establish that the trial court abused its discretion in ruling as it did. Moreover, in light of defense counsel's extensive cross-examination of the detective, Jaramillo has not established how the court's ruling was harmful to his defense.

¶5 Jaramillo next argues the trial court erred by failing to instruct the jury about the inconsistent verdicts in this case. The jury returned a verdict of guilty on the possession of marijuana for sale count, and a verdict of not guilty on the lesser-included offense of possession of marijuana. Although Jaramillo is correct that possession of marijuana is a lesser-included offense of possession of marijuana for sale, *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 12, 15 (App. 1998), that does not mean the verdicts here cannot stand. It is well established in Arizona that consistent verdicts are not required in all cases. *State v. Zakhar*, 105 Ariz. 31, 32-33 (1969); *see also State v. Garza*, 196 Ariz. 210, ¶ 8 (App. 1999) (inconsistent verdicts do not warrant reversal).

¶6 Citing our decision in *State v. Hansen*, 237 Ariz. 61 (App. 2015), Jaramillo asserts that, based on the ambiguous verdicts here, the trial court should have either reinstructed the jurors or directed them to resume deliberations and thus asks that we vacate his conviction and remand.[2] In

[2]In addition to advising the jury on the elements of possession of marijuana for sale and the lesser-included offense of possession of marijuana, the trial court instructed:

Hansen, the jury found the defendant guilty of aggravated assault, but not guilty of the lesser-included offense of simple assault. *Id.* ¶ 3. Under those circumstances, we determined the verdicts could not "be given simultaneous effect," and affirmed the trial court's order granting a mistrial. *Id.* ¶¶ 1, 21, 27. Additionally, the trial court had failed to provide the not guilty verdict to the clerk for reading, which meant defense counsel had no notice of the discrepancy until the court discovered its oversight during the dangerousness phase of the bifurcated trial. *Id.*¶¶ 2-4. Counsel was thus unable to make a timely objection to the inconsistency and request appropriate "[r]emedial efforts," to wit, that the court either reinstruct the jury and send them back to deliberate further, or grant a mistrial. *Id.* ¶¶ 11, 14, 23.

¶7 In this case, however, after the jury returned its verdicts, the trial court read all of them aloud and asked the jury if these were their verdicts and received affirmative responses. Thus, unlike in *Hansen*, where the court only announced the verdict of guilt, Jaramillo was notified of the inconsistency between the completed verdict forms before the court accepted the verdicts. *Id.* ¶ 3. Also unlike in *Hansen*, the trial court here polled the jury. *Id.* ¶ 17; *cf. State v. Engram*, 171 Ariz. 363, 364 (App. 1991) (after guilty verdicts on greater and lesser offenses, court polled jury only on greater offense and vacated verdict on lesser offense without informing counsel of inconsistent verdict before excusing the jury). In the absence of any objection by Jaramillo, the court was not given the opportunity to fix the error here. And notably, we are not presented with an appeal from the granting of a mistrial, as we were in *Hansen*, a decision that we noted was within the trial court's sound discretion in that case. 237 Ariz. 61, ¶¶ 12, 14. Absent any timely objection or motion, the trial court here had no obligation

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> The crime of possession of marijuana for sale includes the less serious crime of possession of marijuana. You may find the defendant guilty of one, but not both of the two crimes. You may also find the defendant not guilty of both crimes.
>
> If you find the defendant not guilty of the more serious offense or if you can't agree after reasonable efforts whether or not the defendant is guilty of the more serious offense, then you should consider the less serious offense.

to resolve the inconsistency in the verdict form sua sponte before finalizing the verdicts.[3] *See Melendez v. United States*, 26 A.3d 234, 248 (D.C. 2011).

¶8 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found none. And we have rejected the arguments Jaramillo raised in his supplemental brief. Accordingly, his convictions and sentences are affirmed.

[3]We also note that although Jaramillo filed a motion to vacate and/or correct the judgment and sentence in January 2018 following his sentencing in December 2017, he did not raise the inconsistent verdict claim he raises on appeal.